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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

B.B., a minor by and through her
mother, Chelsea Boyle,

Plaintiffs,

v.

CAPISTRANO UNIFIED SCHOOL
DISTRICT; JESUS BECERRA, an
individual in his individual and
official capacities; CLEO VICTA, an
individual in her individual and
official capacities; and DOES 1
through 50, inclusive,

Defendants.

CASE NO. 8:23-cv-00306-DOC-ADS

*Assigned for All Purposes to:
Hon. David O. Carter – Courtroom
10A*

**PLAINTIFF'S MEMORANDUM
OF CONTENTIONS OF FACT
AND LAW**

Trial Date: March 12, 2024

Complaint Filed: February 21, 2023

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1 **MEMORANDUM OF CONTENTIONS OF FACT AND LAW**

2 Plaintiff B.B. (“B.B.”), by and through her mother and guardian ad litem,
3 Chelsea Boyle (“Boyle”) hereby submits her Memorandum of Contentions of Fact
4 and Law pursuant to Rule 16-4 of the Local Rules of the United States District
5 Court for the Central District of California. B.B. reserves the right to amend and/or
6 supplement her contentions of fact and law based on the Court’s ruling on the
7 parties’ Motions for Summary Judgment, the Court’s rulings on the motions in
8 limine, and other pre-trial filings:

9 **I. FACTUAL CONTENTIONS**

10 Plaintiff B.B. (“B.B.”) was a seven-year-old first grade student at Viejo
11 Elementary School in March 2021 when she drew a picture that included the phrase
12 “Black Lives Mater” and “any life.” B.B. gifted the drawing to her friend, who is
13 also a classmate, Marlana Clay (“M.C.”). M.C. put the drawing in her backpack and
14 when she got home that day, M.C.’s mother, Cathy Clay (“Clay”) went through her
15 daughter’s backpack and found the drawing.

16 On March 31, 2021, the principal of Viejo Elementary School at the time,
17 Jesus Becerra, (“Becerra”) approached B.B. and encouraged her to follow him.
18 Other students were still around. B.B. followed Becerra and was met with a
19 reprimand for the drawing and told that the drawing was not only “inappropriate”
20 and “racist” but that B.B. was not allowed to create pictures for her friends anymore.
21 Before walking away, Becerra made sure to tell B.B. she needed to apologize for the
22 drawing and would later be told she was to sit out of recess for two weeks. the
23 paraeducator, Ms. Mesa, that B.B. was to sit out of recess for two weeks. B.B. was
24 given no other explanation but felt too discouraged at this point to question the
25 discipline. B.B. did in fact sit out of recess for the next two weeks.

26 B.B. did not discuss the events that occurred with Becerra on March 31, 2021,
27 with her parents as she feared further punishment for the drawing at home. It would
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1 not be until eleven (11) months later that B.B.'s mother, Chelsea Boyle ("Boyle")
 2 would find out through another parent at the school, Jennifer Owen, ("Owen") about
 3 what had transpired. Boyle immediately reached out to Becerra and Capistrano
 4 Unified School District ("CUSD") for an investigation. Boyle went through the
 5 formal complaint process with CUSD and submitted a Tort Claim and e-mails to
 6 apprise them of the issues that were still unresolved.

7 As a result of Boyle demanding a proper investigation into the disciplinary
 8 actions taken regarding B.B. and her drawing, B.B. was retaliated against by
 9 Becerra and Cleo Victa ("Victa"). B.B. was walking outside in the school courtyard
 10 and realized her brother was distraught. B.B. attempted to console her brother but
 11 found Victa was following uncomfortably close. B.B. asked Victa to leave them
 12 alone but Victa refused. Again, all the while Becerra stood by doing nothing. B.B.'s
 13 brother eventually went back to class and B.B., still scared, went to the restroom,
 14 where Victa began to follow her further, *into* the girls' restroom. B.B. called her
 15 mother, Boyle, and asked her mother to pick her and her brother up.

16 **II. LEGAL CONTENTIONS: CLAIMS AND DEFENSES**

17 Plaintiff details a summary of the claims at issue in this case. The summaries are
 18 not to be an exhaustive summary of all evidence. Plaintiff contends that some of the
 19 summaries listed herein may not be issues relevant to trial as the Court is still in the
 20 process of ruling on the Defendants' Motion for Summary Judgment.

21 **A. Claims Plaintiff Has Pled and Plans to Pursue**

22 Claim 1: Defendant Jesus Becerra ("Becerra") violated B.B.'s First Amendment
 23 right to Freedom of Speech in violation of state and federal Constitution under
 24 42 U.S.C. § 1983.

25 Claim 2: Defendants Becerra and Cleotilde Victa ("Victa") violated B.B.'s First
 26 Amendment right through retaliatory harassment under 42 U.S.C. § 1983.

27 Claim 3: Defendant Capistrano Unified School District ("CUSD") negligently
 28

1 supervised and/or retained its employees, Becerra and Victa.

2 Claim 4: Defendants Becerra and Victa intentionally inflicted emotional
3 distress on B.B.

4 **B. Elements Required to Establish Plaintiff's Claims**

5 Claim 1: Defendant Becerra violated B.B.'s First Amendment right to Freedom
6 of Speech in violation of state and federal Constitution under 42 U.S.C. § 1983.

- 7 1. That B.B. was engaged in a constitutionally protected activity;
8 2. That Becerra's actions against B.B. would chill a person of ordinary firmness
9 from continuing to engage in the protected activity; and
10 3. B.B.'s protected activity was a substantial or motivating factor in the
11 Becerra's conduct.

12 See Ninth Circuit Manual of Model Civil Jury Instructions § 9.11 (2007). *See Tinker*
13 *v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

14 Claim 2: Defendants Becerra and Victa violated B.B.'s First Amendment right
15 through retaliatory harassment under 42 U.S.C. § 1983.

- 16 1. That B.B. was engaged in speech protected by the First Amendment;
17 2. That Becerra and Victa's actions would chill a person from continuing to
18 engage in the speech; and
19 3. That B.B.'s protected speech was a substantial motivating factor in Becerra
20 and Victa's decision to retaliate.

21 See Ninth Circuit Manual of Model Civil Jury Instructions 9.11 (2007). *Hartman v.*
22 *Moore*, 547 U.S. 250, 260 (2006). *Boquist v. Courtney*, 32 F.4th 764, 774 (9th Cir.
23 2022).

24 Claim 3: Defendant CUSD's Negligent Supervision and/or Retention of
25 Defendant Becerra and Defendant Victa.

- 26 1. That CUSD hired Becerra and Victa;
27 2. That Becerra and Victa became unfit to perform the work for which they
28

1 were hired;

2 3. That CUSD knew or should have known that Becerra and Victa became unfit
3 and that this unfitness created a particular risk to others;

4 4. That Becerra and Victa's unfitness harmed B.B.; and

5 5. That CUSD's negligence in supervising or retaining Becerra and Victa was a
6 substantial factor in causing B.B.'s harm.

7 See CACI 426 Negligent Hiring, Supervision, or Retention. *D.Z. v. Los Angeles*
8 *Unified Sch. Dist.*, 35 Cal.App.5th 210, 229 (2019).

9 Claim 4: B.B.'s Claim for Intentional Infliction of Emotional Distress.

10 1. That Becerra and Victa acted extreme and outrageous with the intention of
11 causing, or reckless disregard of the probability of causing, emotional
12 distress;

13 2. That B.B. suffered severe or extreme emotional distress; and

14 3. That B.B.'s emotional distress was the actual and proximate cause of Becerra
15 and Victa's outrageous conduct.

16 See CACI 1600 Intentional Infliction of Emotional Distress. *Hughes v. Pair*, 46 Cal.
17 4th 1035 (2009).

18 **C. Brief Description of Key Evidence in Support of Plaintiff's Claims**

19 Claim 1: Defendant Becerra violated B.B.'s First Amendment right to Freedom
20 of Speech in violation of state and federal Constitution under 42 U.S.C. § 1983.

21 B.B. was a 7-year-old student at Viejo Elementary School on March 31, 2021.
22 While a first-grade student, B.B. drew a picture that portrayed children of various
23 races holding hands with the words "Black Lives Mater" and "any life" written
24 above them. On March 31, 2021, Becerra, who was the principal of B.B.'s school,
25 approached B.B. during recess and implied for her to follow him. Becerra asked
26 B.B. if she had drawn the above-described picture, in which she openly informed
27 Becerra that she had. Becerra reprimanded B.B. for the drawing, labeling it
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1 “inappropriate” and “racist.” Further, Becerra told B.B. that she would not be
2 allowed to draw pictures for her friends anymore, that she needed to apologize for
3 the drawing that she gave to M.C. and was subsequently made to sit out of recess for
4 two weeks as a result of the drawing. B.B.’s drawing did not cause a disruption in
5 the classroom, nor pose any threat to other students or staff on the campus. B.B. was
6 so vulnerable and shamed by Becerra’s discipline, that B.B. only continued to draw
7 only in secret. B.B. did not tell her parents about the incident because she feared
8 further punishment. However, another student’s mother at the school, Jennifer
9 Owen, informed B.B.’s mother, Boyle eleven (11) months later. Becerra specifically
10 reprimanded B.B. for her drawing because it contained the phrase “Black Lives
11 Mater” and “any life.” B.B., a minor child, was unaware of any controversial or
12 political views associating with this phrase. The only motivation by Becerra for
13 disciplining B.B. for the drawing was because of the words she chose to display.
14 Without the words “Black Lives Mater” and “any life,” Becerra would not have
15 disciplined her.

16 Claim 2: Violation of B.B.’s First Amendment right against Retaliatory
17 Harassment under 42 U.S.C. § 1983.

18 **March 31, 2021**

19 As a result of the reprimand B.B. received from Becerra for the drawing, B.B.
20 would only continue to draw pictures for her friends in secret, for fear of further
21 punishment. Becerra’s own words labeled B.B.’s drawing as “inappropriate” and
22 “racist.” Becerra specifically reprimanded B.B. for her drawing because it contained
23 the phrase “Black Lives Mater” and “any life.” Without the words on her drawing,
24 Becerra would have not disciplined her. Therefore, B.B.’s protected activity was a
25 substantial or motivating factor for Becerra’s disciplinary conduct.

26 **August 23, 2022**

27 On August 23, 2022, as seen in video footage, B.B. walked out into the school
28

1 courtyard where she noticed her brother was obviously distraught and
2 uncomfortable. B.B. attempted to approach and console her brother when she
3 noticed Victa was closely following them. B.B. asked Victa to leave them alone, but
4 she persisted. B.B. attempted to move about the courtyard, with her brother, to find
5 a safe space to talk. B.B.'s brother eventually left the scene when B.B., now
6 distraught and scared, ran to the girls' restroom to further avoid Victa. However,
7 Victa continued to pursue B.B. even to the restroom, where B.B. then used her smart
8 watch and called her mother to pick her up. Prior to this interaction, the March 31,
9 2021, incident was under investigation by CUSD, in which Boyle had requested
10 further appeals. Victa, knowing the ongoing contentions between B.B.'s family and
11 the school, had made comments regarding B.B.'s mother prior to this interaction.
12 Further, Becerra was present during this interaction, yet did not approach nor offer
13 support to B.B. Boyle picked B.B. up from school, once again, notifying CUSD of
14 its staff's actions.

15 Claim 3: Defendant Capistrano Unified School District's Negligent Supervision
16 and/or Retention of Becerra and Victa.

17 Becerra was the principal of Viejo Elementary School, a school located within
18 CUSD. CUSD initially became aware that there were complaints lodged against
19 Becerra, by B.B.'s mother, Boyle, regarding the drawing incident. CUSD initially
20 tasked Becerra with investigating himself. However, Boyle appealed his initial
21 decision. During this time, CUSD did not once dismiss nor suspend Becerra from
22 his role as the school principal nor require further trainings on the topic of free
23 speech or student discipline. Becerra has not received any recent trainings on these
24 topics. CUSD was aware that Boyle had concerns and reservations about Becerra
25 being allowed around her children, but those concerns were never acted upon by
26 CUSD. CUSD was on notice that Victa should not have been left around B.B. It was
27 because of CUSD's actions here, that B.B. suffered the incident that occurred on
28

1 August 23, 2022.

2 Claim 4: B.B.'s Claim for Intentional Infliction of Emotional Distress.

3 As a result of Boyle demanding a proper investigation into the disciplinary
 4 actions taken regarding B.B. and her drawing, B.B. was retaliated against by
 5 Becerra and Victa. During the appeals process, as described above, B.B.'s brother
 6 was walking in the school courtyard, near the school buildings and still within
 7 schoolhouse gates, when Becerra called Victa, the school counselor, to monitor
 8 B.B.'s brother. B.B. walked outside and realized her brother was distraught. B.B.
 9 attempted to console her brother but found Victa was following aggressively close.
 10 B.B. asked Victa to leave them alone but Victa refused, keeping a close distance.
 11 Again, all the while Becerra stood by doing nothing. B.B., a minor elementary
 12 school student, was nervous and scared. B.B. decided to run toward the restroom but
 13 Victa continued to stalk her. B.B. used her smart watch to call her mother, Boyle,
 14 asking her to pick her up immediately because she was not being left alone. This
 15 interaction caused, and continues to cause B.B., severe emotional distress, which
 16 now manifests into physical injuries.

17 **D. Defendants' Affirmative Defenses**

18 Defendants have informed Plaintiff that they will assert the following
 19 affirmative defenses at trial:

20 First Affirmative Defense: Qualified Immunity;

21 Second Affirmative Defense: Discretionary Immunity; and

22 Third Affirmative Defense: Failure to Comply with the Tort Claim
 23 Requirement.

24 Elements Required to Establish Defendants' Affirmative Defense of
 25 "Qualified Immunity"

26 1. Whether there was a violation of B.B.'s constitutional right; and

27 2. Whether the constitutional right was clearly established at the time Becerra or
 28

1 Victa acted.

2 See Ninth Circuit Manual of Model Civil Jury Instructions § 9.34 (2007).

3 Elements Required to Establish Defendants' Affirmative Defense of
 4 "Discretionary Immunity"

5 Defendants only just raised this Defense in their most recent Reply (Dkt. 79).
 6 By failing to assert this Defense in their initial Answer and giving Plaintiff an
 7 opportunity to respond, Defendants have effectively waived it. *See United States v.*
 8 *Puerta*, 982 F.2d 1297 (1992). Further, Plaintiff is not aware of any jury instruction
 9 that sets forth the elements of a purported Affirmative Defense of "Discretionary
 10 Immunity." Once Defendant provides the applicable jury instruction, Plaintiff will
 11 respond accordingly.

12 Elements Required to Establish Defendants' Affirmative Defense of
 13 "Failure to Comply with the Tort Claim Requirement"

14 This Court has already ruled that this Defense is inapplicable. The Tort Claim
 15 filed in this case effectively put CUSD on notice and is not a basis for dismissal of
 16 the state law claims. (Dkt. 55, FN 5). *See Loher v. Ventura Cnty.*, 147 Cal.App.3d
 17 1071, 1083 (1983). Further, Plaintiff is not aware of any jury instruction that sets
 18 forth the elements of a purported Affirmative Defense of "Failure to Comply with
 19 the Tort Claim Requirement." Once Defendant provides the applicable jury
 20 instruction, Plaintiff will respond accordingly.

21 **E. Brief Description of Evidence in Opposition to Affirmative Defenses**

22 First Affirmative Defense: Qualified Immunity

23 It is illogical for Defendants to claim immunity for their actions when the basis
 24 of their Defense is that the underlying claims have never occurred. However, B.B.
 25 will show the following:

26 **March 31, 2021**

27 B.B. will show that the underlying constitutional violation of her First
 28

1 Amendment right to free speech was a protected activity. B.B.'s drawing was
 2 inherently innocent and raised no concerns for the safety or rights of other students.
 3 B.B.'s drawing did not distract from classroom activities nor cause a substantial
 4 disruption. B.B.'s act of drawing the picture that states "Black Lives Mater" and
 5 "any life" was protected and was a clearly established right at the time that Becerra
 6 disciplined her. Becerra, a school principal, was well equipped with the knowledge
 7 that students still maintain the right to free speech as evidenced by school board
 8 policy. Becerra's discipline of B.B. was wholly unconstitutional by referring to the
 9 drawing as "inappropriate," "racist," telling B.B. to refrain from drawing pictures
 10 anymore, demanding that B.B. apologize for the drawing and further forcing B.B. to
 11 sit out of recess for two weeks.

12 **August 23, 2022**

13 B.B. will show that the underlying constitutional violation of her First
 14 Amendment right to free speech was a protected activity. The right of B.B., to be
 15 free from retaliatory actions in relation to the drawing, were clearly established at
 16 the time Becerra and Victa acted. Becerra's actions of disciplining B.B. for the
 17 drawing initially, were unconstitutional and the subsequent actions of Becerra and
 18 Victa on this day resulted in B.B. being harassed. B.B. intends to prove that there
 19 was an ongoing investigation into the March 2021 incident, leading Becerra to be
 20 hostile toward B.B. as a result. Further, if needed, Plaintiff intends to prove that
 21 Victa had made comments about B.B.'s mother prior, labeling her "mentally
 22 unstable." B.B. intends to show that Victa aggressively followed her around the
 23 courtyard of the school and went so far as to follow B.B. to the girls' restroom. B.B.
 24 intends to prove that B.B.'s right to be free from retaliatory harassment was clearly
 25 established at the time of Victa's actions on this date.

26 **Second Affirmative Defense: Discretionary Immunity**

27 Plaintiff herein realleges all key evidence used in Qualified Immunity.

28

1 Further, B.B. intends to prove that Defendant's discipline and harassment of her
 2 would be outside the bounds of discretion enabled to them by CUSD. CUSD
 3 maintains Board Policy which lays out the protections for free speech, specifically
 4 calling for no discipline in an area such as this – leaving no discretion for Becerra or
 5 Victa to stand behind.

6 Third Affirmative Defense: Failure to Comply with the Tort Claim
 7 Requirement

8 B.B. reemphasizes that this Court has already found that there was a sufficient
 9 Tort Claim form provided to allow CUSD be on notice. (Dkt. 55, FN 5). However, if
 10 required, B.B. intends to prove that she complied with the Tort Claim Requirement
 11 when her mother, Boyle, filed a Tort Claim Form on behalf of her *minor* daughter,
 12 and described in detail the discipline that occurred regarding the March 2021
 13 incident. B.B.'s mother also sent an e-mail to Capistrano Unified School District
 14 informing them that she was seeking counsel if Capistrano Unified School District
 15 could not finalize a resolution. Further, B.B. will provide video evidence that
 16 Plaintiff's Counsel attended a Capistrano Unified School District board meeting and
 17 physically gave the Board a copy of the Tort Claim Form and put them on notice of
 18 a potential lawsuit if they could not remedy the concerns from the drawing incident.

19 **F. Anticipated Evidentiary Issues**

20 Plaintiff anticipates that there may be issues on both sides regarding the
 21 production of video footage and disciplinary reports. Plaintiff is going to continue to
 22 meet and confer with Defendants on this issue. Plaintiff is hopeful that this issue can
 23 be resolved without the Court's intervention.

24 **III. BIFURCATION OF ISSUES**

25 Plaintiff does not request bifurcation of the issues.

26 ///

27 ///

1 **IV. JURY TRIAL**

2 Plaintiff's claims are triable to a jury as a matter of right. Plaintiff timely
3 demanded a jury trial when she filed the instant action on February 21, 2023.

4 **V. ATTORNEY'S FEES**

5 Plaintiff is entitled to recover as a matter of right her attorney's fees under her
6 42 U.S.C. § 1983 claims. *See Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). *See*
7 *also Herrington v. Cnty. of Sonoma*, 883 F.2d 739, 743 (9th Cir. 1989).

8 **VI. ABANDONMENT OF ISSUES**

9 Plaintiff has not stipulated nor abandoned any claims.

10 Defendant has not stipulated nor abandoned any claims.

11

12 **HEATH LAW, PLLC**

13

14 DATED: February 13, 2024

By: /s/ Amber R. Terry

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AMBER R. TERRY

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Attorneys for Plaintiff

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